

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SNELLINK,	.
	. CASE NO.
	11-CV-02164
Plaintiff,	.
	. Newark, New Jersey
vs.	. July 17, 2012
	.
	.
UNIVERSAL TRAVEL GROUP, INC.,	.
et al.,	.
Defendants.	.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE MADELINE COX ARLEO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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Proceeding

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1 (Proceeding Commenced at 3:32:08 PM)

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3 THE COURT: Counsel this is Judge Arleo we
4 just -- we just went on the record in my courtroom in
5 the matter of Snellink v. Universal Travel. Can I
6 have appearances please, starting with the gentlemen
7 in the courtroom.

8 MR. PEARLMAN: Your Honor Peter Pearlman,
9 Cohn Lifland, Pearlman Herrmann and Knopf appearing on
10 behalf of Oneke Shebraut and Holding (phonetic) and
11 Schteig H.S.B., (phonetic) The Spliethoff Group. And
12 with me at the counsel table are my co-counsel David
13 Rosenfeld from Robbins Geller, Rudman and Dowd and
14 Brett Stecker from the Weiser Law Firm.

15 Mr. Rosenfeld has made an application for pro
16 hoc vice admission. And I would ask Your Honor,
17 although it has not been acted upon yet, it was made
18 recently I think yesterday actually, I'd ask Your
19 Honor to permit Mr. Rosenfeld to make the argument
20 this morning -- this afternoon. I beg your pardon.

21 THE COURT: Okay. Any opposition?

22 MR. ROSEN: No, Your Honor.

23 THE COURT: Okay. I'll -- He's so admitted
24 and I'll sign the order today.

25 MR. PEARLMAN: Thank you very much Your

1 Honor.

2 THE COURT: Okay.

3 MR. ROSEN: Good afternoon Your Honor,
4 Lawrence Rosen on behalf of the Van Hove Group and
5 Albert Snellink.

6 THE COURT: Okay. I'd ask you just, Mr.
7 Rosen, to use the microphone to keep your voice up.
8 Because we have -- fortunately we only have a
9 recorder, we don't have a court report.

10 And counsel on the phone. Counsel? Hold on.
11 Counsel, this is Judge Arleo I don't know if you --
12 you -- we just put appearance in the record for the
13 Plaintiffs. Can you state your name for the record
14 please?

15 MR. ZELICHOV: Good afternoon Your Honor
16 Richard Zelichov from Katten Muchin Roseman on behalf
17 of Universal Travel Group.

18 THE COURT: Okay thank you. All right,
19 gentleman have a seat. Just to put this in a little
20 bit of background this motion before the Court today
21 is the motion of the Van Hove Group and the -- is
22 Splitterhoff (phonetic)?

23 MR. PEARLMAN: Speilhoff (phonetic) I believe
24 Your Honor.

25 THE COURT: Speilhoff.

1 MR. ROSENFELD: Spliethoff.

2 MR. PEARLMAN: Oh, Spliethoff, I beg your
3 pardon.

4 THE COURT: Spliethoff Group -- Spliethoff
5 Plaintiff to be appointed lead Plaintiff in the above
6 action. And I'm just going to put a little background
7 on the record.

8 The suit arises out of a series of
9 acquisition by the Universal Travel Group of other
10 companies in 2010. The positive impact of which was
11 allegedly exaggerated by U.T.G. to the S.E.C., the
12 media and investors.

13 In March of 2011 an independent research
14 agency published a report illuminating the alleged
15 misrepresentations. As such the company's stock price
16 dropped dramatically and numerous investors suffered
17 loss.

18 On April 15th of 2011 Plaintiff Investor
19 Albert Snell -- Snellink filed a Class Action against
20 U.T.G. alleging it violated the Act of -- the Exchange
21 Act of 1934.

22 On June 2nd 2012 as per this Court's
23 instruction, Movant the Van Hove Group and Movant the
24 Spliethoff entities filed motions to appointed lead
25 counsel, respectively. And that is the motion that is

1 before the Court today.

2 So, let me tell you a couple of observations.

3 And -- and observations I was really just like --

4 counsel for the Spliethoff group to address is to me

5 it's pretty clear to everybody under the -- under the

6 Cendant case that the threshold inquiry is who

7 suffered the greatest loss. And if that -- and if

8 they -- otherwise satisfy the numerosity and -- and --

9 and adequacy requirements of -- of Rule 23.

10 So, we begin looking at the losses. So we

11 have this -- we have a group and we have Spliethoff.

12 And there was some discussions in the briefs back and

13 forth as to what the -- what the aggregate loss is of

14 each group.

15 And the numbers are a little bit different

16 whether we take a 71 cents a share price, which was

17 the amount -- or a zero percent share price, which was

18 the amount -- the date that, I guess one was the date

19 that the stock sale was halted and the 71 cents was

20 sometime after that. And whether I use the 71 cents

21 a share price or a zero percent share price it appears

22 that under both analysis that -- that the Van Hove

23 Group has a greater loss.

24 And it looks like -- so they have the greater

25 loss and they otherwise satisfy adequacy and -- and

1 typicality. The presumption has to be rebutted. And
2 I'm not sure that they're the appropriate lead
3 Plaintiff.

4 And a lot of your brief was devoted to the
5 argument that you have the single loss. And I don't
6 think that's in dispute, right that you have the
7 greatest single loss. But the analysis that I think
8 I'm constrained by under the Third Circuit teaching
9 in Cendant is -- is that that really has to be
10 rebutted. And it can't be rebutted just by saying, we
11 suffered more signally than you guys suffered
12 collectively.

13 So, that's really like -- like to focus your
14 argument on this afternoon, because that's what has
15 the greatest concern for me here today.

16 MR. ROSENFELD: Certainly, Your Honor. May I
17 approach the -- here?

18 THE COURT: Yeah, I prefer, if it's okay with
19 you, you can argue just from your table.

20 MR. ROSENFELD: Okay.

21 THE COURT: That's -- That's preferable for
22 me.

23 MR. ROSENFELD: Just make sure I'm being
24 heard for the record.

25 THE COURT: Okay.

1 MR. ROSENFELD: Thank you Your Honor --

2 THE COURT: Feel free to pull it further --

3 closer to you too. That's great.

4 MR. ROSENFELD: Okay. Does that work?

5 THE COURT: Perfect.

6 MR. ROSENFELD: Thank you Your Honor. Again,

7 David Rosenfeld from Robbins Geller on behalf of the

8 Spliethoff Entities.

9 Your Honor the P.S.L.R.A. does direct that
10 the Court point as lead Plaintiff the investor who
11 represents the largest financial interest and also
12 otherwise adequate and typical. And of course the
13 question is, who is the investor that represents the
14 largest financial interest? And what was the whole
15 purpose behind Congress enacting the Private
16 Securities Litigation formats in creating these
17 standards?

18 Your Honor the whole purpose was that they
19 wanted to insure that investors who suffered a large
20 financial interest -- who suffered large financial
21 losses were sufficiently motivated to adequately
22 represent counsel in these types of cases. And
23 that's why it's important to consider that if a group
24 of investors are seeking to be aggregated to create
25 the largest financial interest, that there is a

1 proper group that is being proposed. And that is
2 exactly what was considered by the Third Circuit in
3 Cendant.

4 And the Third Circuit did an analysis of the
5 types of groups and set forth a number of standards
6 what the Court is to consider in determining whether
7 or not a group is proper or not. And there's a
8 number of District Court decisions in this court
9 house that subsequently interpreted Cendant and held
10 that the factors that were considered by Cendant, such
11 as whether or not there was a preexisting
12 relationship among the relationship that have cobbled
13 together now, to "represent the largest financial
14 interest." That is something that we think has
15 happened here.

16 And clearly, if the court were to look at
17 the individual interests of the Spliethoff Group,
18 which is roughly, again, there's a -- I guess there's
19 somewhat of a debate whether you use the zero dollar
20 hold price or the 71 cent hold price for the shares
21 that were retained. Which I don't think makes a
22 difference again. Because at the end of the day the
23 Spliethoff entity would have a larger individual
24 financial interest under either one of those
25 analyses.

1 THE COURT: And conversely the Van Hove
2 group has a greater collective interest either
3 analysis.

4 MR. ROSENFELD: Correct. But the Spliethoff
5 entities have a real financial interest of 227,000
6 whereas the Van Hove Group you have one individual
7 with 16,000, another with 59,000, another with 48,000
8 61 --

9 THE COURT: Let me just stop you for a
10 minute. I hear you. I understand all that. But
11 here's what Cendant says about that.

12 "More to this junction that we disagree with
13 those Courts that have held the statute invariably
14 precludes a group of unrelated individuals from
15 serving as a lead Plaintiff. The statute contains no
16 requirement mandating the members of proper group be
17 'related' in some manner. It requires only that such
18 group fairly and adequately protect the interest of
19 the -- of the -- of the Class."

20 "We do not intimate that the extent of the
21 prior relationships and their connection between the
22 members of the moving group should not properly enter
23 into calculus as to whether they would fairly and
24 adequately protect this Class. But it is this test,
25 not one of relatedness which the court should be

1 concerned."

2 So, they're saying that unrelated entities
3 can be -- are -- are appropriate. In fact they --
4 they say that they reject courts that say you can't
5 have unrelated individuals.

6 MR. ROSENFELD: Well, as a black mark -- as
7 a black line, Your Honor. You know, as a matter of
8 law that's -- that's what they say. They say are
9 certain limited exceptions. And if I can refer to
10 Your Honor to page 267 of the Cendant opinion. Right
11 at the start of that page is where it says;

12 "If, for example, the Court were to determine
13 that the Movant 'group' with the largest losses had
14 been created by the efforts of lawyers hoping to
15 ensure their eventual appointment as lead counsel, it
16 could well conclude, based on this history, that the
17 members of that 'group' could not be counted on to
18 monitor counsel in a sufficient manner."

19 And Your Honor I -- I respectfully submit
20 here that this proposed group is exactly the group
21 --

22 THE COURT: But, what do you base -- in other
23 words they cite where -- where that, you know, you use
24 cobble together language.

25 MR. ROSENFELD: Right.

1 THE COURT: And they said we would conclude
2 based on that history that the group cannot be
3 counted on to monitor counsel in a sufficient
4 manner. They have affidavits that say we are educated
5 folks and we -- we can work together with this
6 counsel.

7 You make the argument that it's just a group
8 cobbled together and that they can't adequately
9 protect the interest of the Class. But I don't see
10 any affidavits. I see no factual information other
11 than an argument that seems to be unsupported.

12 MR. ROSENFELD: Well, Your Honor if I can
13 direct your attention to the case cited in our brief
14 called Teran v. Subaye. That's S-U-B-A-Y-E and
15 Teran is T-E-R-A-N, which is before Judge Buchwald in
16 the Southern District of New York. In which the
17 exact same type of group was proposed by the Rosen Law
18 Firm.

19 THE COURT: Of course that's not a Third
20 Circuit case.

21 MR. ROSENFELD: Correct.

22 THE COURT: Right? So that's really not --
23 I'm not sure what the second -- is, but I'd like to
24 get back to my --

25 MR. ROSENFELD: It's -- it's --

1 THE COURT: Go ahead.

2 MR. ROSENFELD: Wait Your Honor, I just note
3 that the declarations that were submitted there were
4 the exact same types of declaration -- it presented
5 the same exact content as the declarations that were
6 submitted here.

7 And there, Judge Buchwald said well clearly
8 these people had no relationship, they didn't know
9 each other existed prior to meeting with their
10 counsel. And their counsel clearly put them together
11 with for the purposes of trying to create a large
12 financial interest.

13 And there's no other rational explanation.
14 And certainly nothing has been offered here as to why
15 these five -- or six really, different individuals
16 who had nothing to do with each prior to this lawsuit
17 have all of a sudden showed up and said well, now we
18 have the large financial interest because we take
19 each one of our smaller financial interest and you
20 add them up together all of a sudden we have a big
21 number.

22 And Your Honor, there's nothing -- you know
23 if that was the case then we certainly -- if we
24 thought that was appropriate we certainly would have
25 reached out to Garrett Wyatt (phonetic) who was one of

1 the investors who filed the motion for relief --
2 Plaintiff, back in June of 2011. And if we thought it
3 was appropriate we could have added his financial
4 interest and presented it to the Court now when we
5 filed our motions last month. And said, hey Judge we
6 have the biggest financial interest now. But it's not
7 appropriate.

8 The Third Circuit says it's not appropriate.
9 It says that our circumstances, which it would be
10 appropriate, but certainly here it's not. Especially
11 when you have an individual investor with a very, very
12 large loss, marginally below the collective loss of
13 the Van Hove Group.

14 THE COURT: Okay. Anything further?

15 MR. ROSENFELD: I would refer Your Honor to
16 the In Re Opnext decision which is in this
17 District. The Able -- Able Laboratories decision
18 which is in this District. In which each one of them
19 cautioned against appointing investors who have been
20 cobbled together, simply for the fact that the law
21 firm is seeking to aggregate the size of their
22 financial interest to appoint their group as lead
23 Plaintiff.

24 And I would just note that we've cited a
25 number of cases in our brief which talk about where

1 you have a single investor who is larger than any of
2 the individual members of a competing group. That the
3 Court's defer to that single investor, since it really
4 represents that largest financial interest. Which is
5 what Congress wanted to have serving as lead Plaintiff
6 in these types of cases.

7 THE COURT: Let me ask you though, do you
8 have any facts that you can put before the Court to
9 suggest that this group of un -- un -- that this group
10 of unrelated individuals cannot fairly and adequately
11 protect the interest of the Class?

12 There's no cert -- did I miss any
13 certifications or any factual information? Because I
14 -- I have certifications from -- from the -- from the
15 Plaintiffs. I have nothing -- no factual
16 certifications from you other than your arguments that
17 because they're unrelated that they must be cobbled
18 together by the lawyers. And if they're cobbled
19 together by the lawyers they somehow cannot be
20 expected to fairly and adequately protect the interest
21 of the Class.

22 MR. ROSENFELD: Well, I would not a couple of
23 things -- a couple of things Your Honor. Number one,
24 they've made no representations about their
25 experiencing in monitoring counsel. Certainly not --

1 THE COURT: I'm going to ask you -- I asked
2 you three times. I just want to make sure for the
3 record. Have you put anything before the Court and by
4 way of certifications or affidavits, factually, about
5 the ability of this group to fairly and adequately
6 protect the interest of the Class? There's nothing,
7 right?

8 MR. ROSENFELD: We've made arguments, Your
9 Honor.

10 THE COURT: That's -- that's all I'm asking
11 counsel. I've asked it three times.

12 MR. ROSENFELD: There's no supplemental
13 submissions --

14 THE COURT: There's no submission.

15 MR. ROSENFELD: -- other than our brief.

16 THE COURT: So, the brief is just arguments
17 that -- is there anything in their certifications that
18 you take issue with factually?

19 MR. ROSENFELD: Their declaration I take an
20 issue with Your Honor.

21 THE COURT: What -- what part of their
22 declarations?

23 MR. ROSENFELD: That -- that joint
24 declaration. That's exactly the same representations
25 that were found to be inadequate by Judge Buchwald,

1 number one.

2 THE COURT: Right, no I'm asking a
3 different question. Is there anything that you
4 challenge --

5 MR. ROSENFELD: There inability --

6 THE COURT: -- factually in their
7 affidavits?

8 MR. ROSENFELD: Their inability to provide
9 that document in a timely manner. They first supplied
10 it --

11 THE COURT: What document?

12 MR. ROSENFELD: Their joint declaration.

13 THE COURT: All right, is there any -- I'll
14 ask it again. Is there anything stated in the fact
15 -- factually in the affidavit that you take issue
16 with?

17 MR. ROSENFELD: Any representations?

18 THE COURT: Uh huh.

19 MR. ROSENFELD: I don't think it really says
20 anything that there is take issue with, because
21 they've made no representation about their experience
22 in supervising counsel which is somewhat important
23 when you have a group of investors who really just
24 being overseen by counsel.

25 As -- and that's precisely the concern the

1 courts have. That you're having a number of
2 individual investors, with small financial interests
3 in this outcome of this case that are being -- if
4 counsel in charge -- I'm telling them what -- what's
5 to be done, what needs to be done, how things are
6 getting done and none of them seem to have a large --
7 a sufficiently large financial interest to act on
8 their own and insure that the Class is protected
9 here.

10 THE COURT: Okay.

11 MR. ROSENFELD: Okay, thank Your Honor.

12 THE COURT: Thank you. Mr. Rosen?

13 MR. ROSEN: Yes, Your Honor. Your Honor
14 under the Cendant case once the group or lead -- lead
15 Plaintiff Movant with the largest financial interest
16 has been identified, the Defendant -- I'm sorry the
17 other Movants have to provide proof that they're
18 unable to represent fairly and adequately the interest
19 of the Class.

20 And the Cendant case -- and I think Your
21 Honor was going in that direction in -- in your
22 questioning. It -- it specifically says proof is
23 required, proof, not speculation. And in fact in the
24 Cendant case there was this allegation that they had
25 chosen their lawyers because one of the law firms had

1 donated money to the -- to the investment -- one of
2 the investment funds. There were three -- there are
3 three unrelated -- it was an un -- three unrelated
4 investment funds that had gotten together as a group
5 in Cendant by the way.

6 And the court said simply -- the Third
7 Circuit said simply saying that there's some --
8 something untoward here because there was a -- a --
9 one of the law firms had made a donation in the past.
10 That's not proof. That -- you know, and even though
11 it was -- they -- they -- the Third Circuit
12 acknowledged and the District Court had acknowledged
13 that there had been a donation. There was no
14 evidence, not a declaration. And they made note of
15 this in the decision. There was no declaration, no
16 facts, nothing to suggest that the decision to -- to
17 hire those law firms was made on any other reason than
18 merit.

19 And so, the same thing is here, Your Honor.
20 Counsel for the Spliethoff entities said it himself.
21 We think it happened here. We think. Or he also said
22 nothing has been offered here. It was his own words.
23 Nothing -- and that's true, nothing has been offered
24 to rebut -- nothing factual has been offered to rebut
25 the presumption that has attached to the Van Hove

1 Group's application. And in fact we have five well
2 qualified people; a professional investor, a P.H.D. in
3 economics who worked at the U.N., a C.P.A., a small
4 business owner.

5 I mean these -- these are well qualified
6 people. They've chosen -- and this is one of the --
7 one of the things that Cendant looks at, they've
8 chosen capable counsel. We have a lot of experience
9 doing these -- cases. We've got about seven very good
10 decisions on motions to dismiss. We've settled
11 several -- cases already. I could give you a list of
12 two or three that was just recently settled.

13 So, all of the dictates of Cendant we have --
14 we meet. The -- the group is capable of -- of -- of
15 fulfilling the responsibility. Their interest are
16 aligned. They've got adequate counsel. And there's
17 -- there's no evidence of any conflict of interest at
18 all.

19 So, we've -- we've met the -- we've met the
20 dictates -- dictates of Cendant. And there being no
21 evidence at all to rebut this presumption, we
22 respectfully request the Court appoint the Van Have
23 Group.

24 THE COURT: Thank you. Anything you'd like
25 to add? Go ahead.

1 MR. ROSENFELD: Your Honor if I just may note
2 that I can cite you a handful of decisions that I have
3 in my -- that have here are post-Cendant, which
4 consider -- which direct the Court to consider and --
5 and I'll quote, and this is -- this is from the In
6 Re Opnext Securities Litigation by Judge Pisano. And
7 it's also citing to the Smith v. Supreme Specialties
8 case. In which it says;

9 'In deed the P.S.L.R.A. permits a group of
10 persons to service the Plaintiff and there's no
11 limitation that the group include related
12 individuals," which is what Your Honor has been saying
13 until now.

14 "However, the group must be capable of
15 fairly and adequately protecting the purported Class'
16 interest. To determine if a group could fairly and
17 adequately represent those interest a court should
18 consider; One, whether the individuals in question
19 had a preexisting relationship; Two, the extent of
20 that relationship; Three, whether the group was
21 created by the efforts of lawyers for the purpose of
22 obtaining the Plaintiff status; and Four, whether the
23 group is too large to adequately represent the
24 Class."

25 "Thus, a group -- a court may reject a group

1 if it appears that the group has been created for the
2 purpose of serving as lead Plaintiff."

3 And here, Your Honor, it was a motion for
4 reconsideration which the Court said, that even though
5 there -- I think there were a number of married
6 couples involved, the court, nonetheless said -

7 THE COURT: How big was the group?

8 MR. ROSENFELD: It was four. Two -- two sets
9 of married couples, I believe.

10 The court rejected that group and said there
11 hasn't been an adequate showing. That they had a
12 preexisting relationship. What the relationship was
13 and whether the group was created for the purposes of
14 -- of aggregating their financial interest.

15 And the Smith v. Supreme Specialties case is
16 -- cites -- makes that same point as well. And
17 again these are all post -- post-Cendant. And the
18 rest are not from the Southern District -- from the
19 District of New Jersey, but there are legions of
20 other cases that have made that exact point, Your
21 Honor.

22 THE COURT: Thank you. Anything you'd like
23 to add?

24 MR. ROSEN: Yes, Your Honor, I would like to
25 address the Opnext case. It -- that decision is -- is

1 and out -- I can't really explain it. It doesn't
2 really follow faithfully Cendant. Because what you
3 had in that case is you had two married couples who
4 had known each other for 15 years. So, they had a 15
5 year preexisting relationship, family friends, two
6 married couples. Clearly they didn't get married in
7 order to participate in the litigation or become
8 friends.

9 So the decision there it really -- it
10 doesn't -- it doesn't follow -- it doesn't follow
11 Cendant. And I -- I can't explain it. And it really
12 shouldn't be followed. It's not -- it's not
13 precedential in this -- in this -- here. And it --
14 it's not -- it doesn't follow -- it simply doesn't
15 follow Cendant.

16 The types of situations that the Third
17 Circuit was referring to when they talked about groups
18 being cobbled together, what they were talking about
19 is just what Mr. Rosenfeld mentioned, a situation
20 where one lead Plaintiff Movant files -- files a
21 motion for lead Plaintiff. Another files another one.
22 A third files a third. And then Movant one and two
23 say, hey let's get together after motions are filed
24 and let's beat the third guy. You know, that's what
25 Razorfish (phonetic) was talking about, the case that

1 they cite.

2 You know, so that's -- that's not what
3 happened here. This is a situation -- the
4 declaration, you know proven that these -- these
5 people sat down, discussed what they wanted to do.
6 This is not several law firms jockeying together. You
7 know this -- this is a single law firm with -- you
8 know and -- and -- and five clients to the single law
9 firm.

10 So, it's really not what Razorfish was
11 talking about and what the Third Circuit was -- was
12 intimating when they discussed, you know. They
13 specifically say unrelated groups are permitted.
14 What's important is that they have the ability and the
15 stand to represent the Class vigorously. And these
16 people all lost substantial sums of money. They're
17 all capable, qualified professionals. And they have
18 produced evidence showing that they intend to
19 vigorously prosecute this action. Thank you.

20 THE COURT: Okay. Thank you. I'll begin
21 with a little background on the P.S.L.R.A. and the
22 Cendant standard.

23 The motion here turns on the interpretation
24 of the Private Securities Litigation Reform Act, a law
25 that complements the Exchange Act of 1934 and codifies

1 a process for appointing lead counsel in a Class
2 Action.

3 The P.S.L.R.A. states that the most
4 adequately Plaintiff is the Movant with the largest
5 financial relief sought by the Class and who other --
6 who otherwise satisfy the requirements of Rule 23,
7 that's adequacy and typicality.

8 The Movant that satisfies these criteria is
9 the presumption -- is the presumptive lead
10 Plaintiff. The presumption can be rebutted if only a
11 competing lead Plaintiff disproves that the
12 presumptive lead Plaintiff does not satisfy the
13 requirements of 23.

14 And undisputed in this Circuit that In Re
15 Cendant is a seminal case interpreting the
16 P.S.L.R.A.'s method of selecting a lead Plaintiff.
17 In Cendant the Third Circuit noted that the
18 reviewing court must first identify the Movant seeking
19 "the largest financial relief." That's 264 F.2d at
20 262.

21 The P.S.L.R.A. does not specify a "hard and
22 fast" rule for determining largest loss, but states --
23 state that the courts have approvingly considered the
24 number of shares that the Movant purchased during the
25 punitive Class period, the total net funds expended by

1 the Plaintiffs and the approximate loss suffered by
2 the Plaintiffs.

3 Once identified the courts must then evaluate
4 whether the Movant with the largest financial loss can
5 satisfy Rule 23. Here the relevant requirement of 23A
6 or subsections 3 and 4, which compel lead Plaintiff --
7 which compel that a lead Plaintiff's claim must be
8 typical and that they can adequately represent the
9 Class in this litigation.

10 In Cendant the Third Circuit interpreted the
11 language of the P.S.L.R.A. and held that the potential
12 lead Plaintiff with the greatest financial loss only
13 make a prima facie case that it satisfies Rule 23. In
14 evaluating whether the claims are typical the court
15 held that the court should consider whether the
16 circumstances of the Movant with the largest loss are
17 markedly different on the -- or -- or legal theory
18 upon which claims are based different from the claims
19 upon which the other member of the Class will be
20 based.

21 In evaluating whether the largest loss
22 movement -- Movant satisfies Rule 23 adequacy
23 requirement the Court should consider whether it has
24 the ability in -- to represent the claims of their
25 Class vigorously, whether it has obtained adequate

1 counsel and whether there's a conflict between the
2 Movant's claims and those asserted on behalf of the
3 Class.

4 Additionally, the Cendant court highlighted
5 other factors that can influence whether the largest
6 loss Movant can adequately represent the Class.
7 Whether it has picked competent and negotiated fair
8 fee arrangement. Whether -- if it is a group of
9 investors if the group is too large to manage,
10 effectively.

11 And lastly, the Cendant -- in Cendant the
12 Third Circuit explains that it disagrees with other
13 Circuits that found unrelated individuals cannot
14 properly constitute a group of investors and
15 appropriate become the Class Action.

16 As I -- as I cited earlier the Third -- as I
17 said early the Third Circuit noted that if the group
18 was cobbled together by attorneys solely for the
19 purpose to secure their eventual appointment as lead
20 counsel, a court could rule that an investor group in
21 that circumstance may not be counted to monitor
22 counsel in a -- in a sufficient manner.

23 And let's talk a little bit about the
24 preliminary analysis which is the loss here. And
25 Circuit talks -- Cendant talks, and I noted earlier,

1 that unrelated entities can be viewed as -- as a group
2 and as lead Plaintiff. And, so the Court begins by
3 looking at the loss, alleged by the -- the two
4 competing Plaintiff here.

5 And the Van Hove Group under any analysis has
6 the largest loss here. Whether we take the 71 cents a
7 share loss evaluation or the zero cents a share loss
8 evaluation. In either scenario the -- the Van Have
9 Group has the largest loss. Under the 71 cents a
10 share the Van Have Group suffered a potential loss or
11 an arguable loss of 230,607 and the Spliethoff Group
12 is 206,431. At zero cents a share Van Hove is 255 and
13 Spliethoff is 227.

14 So, it -- it is clear to me that the Van Have
15 Group is the Movant who suffered the largest loss.
16 Although admittedly the Van Hove does constitute a
17 group of investors.

18 The Court then must look at whether they
19 satisfy Rule 23 requirement for typicality and
20 adequacy. And -- and again, I just want to read a
21 little bit from -- from Cendant. It says;

22 "In conducting the initial inquiry as to
23 whether the Movant and the -- with the largest loss
24 satisfy typicality and adequacy the court may --
25 consider the pleadings that have been filed, the

1 Movant's application, and any information that the
2 court requires to be submitted. Keeping with the
3 statutory text, however, the court generally will not
4 consider at this stage any arguments by other
5 members of the punitive Class. Rather such
6 allegations should be dealt with in terms of assessing
7 whether lead -- lead Plaintiff's presumption has been
8 rebutted."

9 So, that is -- that is the teaching of
10 Cendant. And I'm going to go further to -- a little
11 bit further down on page 265 the Cendant court
12 explains;

13 "Making the initial adequacy assessment in
14 this context the Court should also consider two
15 additional factors. Because one of the lead
16 Plaintiff's most important function is to select and
17 retain lead counsel. One of the best ways for a court
18 to insure that it will fairly and adequately represent
19 the interest of the Class it inquire whether the
20 Movant has demonstrated a willingness and ability to
21 select competent counsel and to negotiate a reasonable
22 retainer agreement with counsel."

23 "Thus a court might conclude that the Movant
24 with the largest loss could not surmount the threshold
25 adequacy, -- legal experience, or sophistication

1 intended to select as lead counsel a firm that was
2 plainly incapable of undertaking the
3 representation."

4 "We stress, however, that the question at
5 this stage is not whether the Court would approve the
6 Movant's choice of counsel, or the terms of its
7 retainer agreement, or whether another Movant may have
8 chosen better lawyers and negotiated a better a fee
9 agreement. Rather the question is whether the choice
10 is made by the Movant with the largest losses are so
11 deficient as to demonstrate it will not fairly and
12 adequately -- adequately represent the interest of the
13 Class."

14 And there's -- and I am satisfied based on
15 the pleadings, the affidavits before me, that as a
16 threshold issue the Van Hove Group has met that
17 standard. And again, it's not whether another law
18 firm would be better, the question is whether the
19 choices made by the Movant with the largest loss was
20 so deficient as to demonstrate it will not fairly and
21 adequately represent the interest of the Class.

22 The Van Hove Group satisfies Rule 23
23 requirements for typicality and adequacy. In terms of
24 typicality the Van Hove Group claims appear to be
25 identical to the general claims in the complaint and

1 are invested in -- and it's really not really, I don't
2 think, in much dispute in this motion -- invested in
3 the U.T.G. based on reports of growth expansion. The
4 reports revealed to be fraudulent and its investments
5 were substantial.

6 In opposition the Spliethoff entities offer
7 no evidence that the Van Hove Group's theories of
8 liability are in conflict with those of the punitive
9 Class members. Therefore I'm satisfied that
10 typicality is met here.

11 I'm also satisfied that adequacy is met under
12 -- in this context. Considering its alleged
13 substantial financial losses as result of U.T.G.
14 fraudulent -- alleged fraudulent behavior the Van Hove
15 Group clearly has the incentive to vigorously go to
16 get its claims.

17 According to Attorney Rosen's declaration the
18 Van Hove has chosen his firm to represent it. A firm
19 that has experience in these types of securities
20 litigation.

21 Given these facts and the lack of any
22 apparent conflict with other Class members the Van
23 Have Group satisfies a prima facie element of
24 adequacy.

25 And I -- I'd even note the certification of

1 Pascal Van Hove (phonetic) talks about this in
2 detail. "I have several decades," Paragraph Seven,
3 "of investment experience. I've made the considered
4 decision to serve as lead Plaintiff in this case and
5 -- and I'm committed to making sure this case is
6 prosecuted to its fullest."

7 I have -- he talks about his decision to
8 entrust and to -- to -- to work with the -- the Rosen
9 Firm. And under that standard, set forth by Cendant,
10 I am satisfied that -- that the Van Hove Group meets
11 the adequacy requirement.

12 I stated above, based on the experience of
13 the Rose Firm, it appears to be well equipped to
14 litigate this Class Action. Furthermore, the
15 Spliethoff entities have offered no evidence that the
16 Rose Firm -- with the Van Hove Group is egregiously
17 unfair. That the Van Hove Group is too large with
18 five members, a number consistent with S.E.C.
19 guidelines and sanctioned by the Third Circuit in
20 Cendant.

21 Finally, although the Van Hove Group is a
22 group of unrelated investors the Third -- this Court
23 is none -- nonetheless satisfied based on the
24 affidavits and the pleadings that is made up of
25 learned professionals including; a tax professional, a

1 C.P.A., a professor of Engineering, a retired civil
2 servant, head of a -- of a company.

3 Therefore, given their financial stake and --
4 and their backgrounds members of the Van Hove Group
5 would unlikely fail to monitor counsel effectively.
6 And in deed the members of the Van Hove Group declared
7 that they will take an active role in monitoring the
8 litigation.

9 So, the first step is met. The Court is
10 satisfied that the Van Hove Group has made a prima
11 facie showing that it satisfied the requirements of
12 Rule 23. And thus -- we name the present of lead
13 Plaintiff.

14 I am further satisfied that this -- this
15 Spliethoff entities have failed to rebut this
16 presumption through any competent evidence
17 demonstrating that -- that the -- the Van Hove Group
18 has failed to meet its burden.

19 The Spliethoff Entities argued that they
20 should be named lead Plaintiff because they
21 represent -- the have the greatest of one
22 individual, Hans Spliethoff, as opposed to the
23 collective five individuals who comprise the Van
24 Hove Group. They also allege that because they are
25 not related that -- that is grounds to fund their

1 cobble together and to not be allowed to proceed as a
2 group.

3 Yet, although I appreciate that argument, as
4 noted Cendant has indicated that groups of multiple
5 members are acceptable as long as they meet Rule 23
6 requirements.

7 As this Court has already determined and as
8 I've -- I've cited from Cendant the Van Have Group --
9 Van Hove Group has sustained a larger financial loss
10 then the Spliethoff Group. It was incumbent upon the
11 Spliethoff entities to rebut their presumption by
12 presenting evidence disproving that the claims are
13 typical or that they're not competent. And I'm
14 satisfied that such evidence has not been put before
15 the Court.

16 And -- and for that reason I am -- I'm going
17 to grant Van Hove Group's motion to be appointed lead
18 Plaintiff. And to the extent that the Spliethoff
19 entities have filed a motion as well, their -- their
20 competing motion is denied.

21 And that's the basis for my ruling. I guess
22 the next issue, given that would be to see if there's
23 any further scheduling that needs to be put in effect
24 for filing of an amended complaint and then ultimately
25 motions to dismiss.

1 MR. ROSEN: Yes, Your Honor the Plaintiffs
2 would -- intend to file an amended complaint and we
3 would like 45 days if that's okay.

4 THE COURT: Why don't we say by September 1.
5 Or what's -- September 1 is a Saturday, why don't we
6 say by September 7th. Okay, after Labor --

7 MR. ROSEN: September 7th?

8 THE COURT: Yeah that gives you after Labor
9 Day, okay.

10 MR. ROSEN: Yes, thank you Your Honor.

11 THE COURT: And Defendants are you still with
12 me?

13 MR. ZELICHOV: We are Your Honor thank you
14 very much.

15 THE COURT: Okay. Okay. And could you
16 oppose -- I assume you want to file a motion to
17 dismiss, right?

18 MR. ZELICHOV: We intend to do so, correct.

19 THE COURT: So, they're going to file an
20 amended complaint by September 7th. Could you -- you
21 want to say by October 8th you can file your motion to
22 dismiss?

23 MR. ZELICHOV: I believe Your Honor has
24 already entered Orders giving us 45 days after they
25 file their amended complaint.

1 THE COURT: Okay. So then that would be --
2 I'm sorry. Then that would be -- I want to say
3 October 22nd.

4 MR. ZELICHOV: That would be fine, Your
5 Honor.

6 THE COURT: And then the reply brief would be
7 November 5th. Okay. I'll put that briefing in a
8 separate Order. Counsel?

9 MR. ROSEN: Oh, Your -- Your Honor when --
10 when would our opposition due -- be due?

11 THE COURT: Is November 5th okay with you?
12 Do you --

13 MR. ROSEN: November -- so -- so they filed
14 it their --

15 THE COURT: I'm sorry, I'm -- I'm -- that's
16 my mistake. September 7th would be amended
17 complaint. The motion to dismiss would be October
18 22nd, Okay.

19 MR. ROSEN: Could we have 45 days?

20 THE COURT: Yes. So -- I'm sorry, I
21 misspoke. So that would be one, two, three, four,
22 five -- December 3rd --

23 MR. ROSEN: Yes, Your Honor.

24 THE COURT: -- would be your opposition. And
25 why don't we say December 31st the reply.

1 MR. ZELICHOV: That's fine Your Honor.

2 THE COURT: Okay. So, get everything in by
3 the end of the year. Thank you.

4 MR. ZELICHOV: Thank you Your Honor.

5 THE COURT: Okay. Thank you both.

6 MR. ROSEN: Thank Your Honor.

7 MR. ROSENFELD: Thank Your Honor.

8 (Conclusion of Proceeding at 4:08:19 P.M.)

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